United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-7433

ELI RAITPORT,
Plaintiff-Appellant,

v.

COMMERCIAL BANKS LOCATED WITHIN THIS DISTRICT AS A CLASS, FOUNDATIONS OPERATING INVESTMENT PORTFOLIOS AND MANAGED DIRECTLY OR INDIRECTLY BY ABOVE SAID BANKS AS A CLASS,
Defendants-Appellees.

#75-7433

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P/S

APPELLANT'S REPLY BRIEF

ELI RAITPORT*
1807 Mower Street
Philadelphia, Pa., 19152

* Appellant - Raitport commenced this action pro se and pursuing it pro se as well as other actions, because he believes that litigation of that complexity requires individual(s) who encompass (es) the following eight skills and qualifications: 1) in engineering, 2) in socio -economics, 3) in industrial economics, 4) in accounting, 5) in contemporary law, 6) in basic law, 7) confidence in Judicial Administration of United States, 8) unlimited willpower and idealism. It will not suffice combined skills, but the individual must posess all the skill. (As it is known in phylosophy the distinction of doctrines: a "whole embracing details" and a "collection of details.").

Among his acquaintances, this appellant does not know any member of a Bar who would possess the above eight qualifications; nor he believes that one lacking those skills would engage himself on contingent basis.

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CERTIFICATE OF SERVICES

I, ELI RAITPORT, hereby undersigned, certify that the true and correct copy of this attached document entitled Appellant's Reply Brief has been served on defendants by mailing it to each attorney on record, Shearman & Sterling, 53 Wall Street New York, New York 10005, on October 10, 1975; First Class, postage prepaid.

Eli Raitport

ELI RAITPORT

Sworn to before me Ruth Paller Notary

On October 10, 1975

RUTH PALLER
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires August 19, 1978

APPELLANT'S REPLY BRIEF

I. QUESTIONS OF APPEAL MUST REMAIN THOSE SUBMITTED BY APPELLANT.

1. Appellees ("Citibank") in its Brief attempting to substitute the issues for review presented for appeal by appellant ("Raitport") pursuant to Rule 28(a) FRApp. P., by District Court's conclusion rather than issues. Raitport respectfully submits that that is impermissible for the following reasons:

Firstly, the Rule 28(a) FRApp. P(2) requires that a statement of the issues be presented; it is independent from statement of disposition of the case required by sub-sub para (3) supra.

2. Secondly, it is the office of the appellant to present the issues for appeal; it cannot be presented by appellees, save the later makes a showing that the issues (questions) which led to the conclusion are disparate from those conceived by appellant.

> "An assignment of errors in appellate procedure is an enumeration by appellant or plaintiff in error of the errors alleged to have been committed by the court below in the trial of the case upon which he seeks to obtain a reversal of the judgment or decree; it is in the nature of a pleading, and performs in the appellate court the same office as a declaration or complaint in a court of original jurisdiction. Such an assignment is appellant's complaint, or pleading, in the appellate court, and takes the place of a declaration or bill." (citations omitted)
> C J S - Appeal and Error - 1212

Democracy must fail if defendant would be permitted to substitute

the complaint against him, rather than to answer it. The issues have been set out by Raitport pointedly correct.

> "Several errors in law may be relied on in the assignment; each assignment of error is a separate paragraph of appellant's complaint in the reviewing court." (citations omitted) 5 CJS - Appeal and Error-1217

3. Thirdly, it is elementary that jurisdiction of the court of Appeals is to review the issues which led to the conclusion. See 5 CJS - 1218 and seq. Wright - Miller, Fed. Prac. and Proc. Civ. 2571, states that the purpose of requirement of the District Court to find specially facts and law, pursuant to Rule 52 (a) FRCP, is to aid the Appellate Court whose jurisdiction is to review how the District Court reached the conclusions.

> "One purpose of requiring finding of facts is to aid the appellate court by affording it a clear understanding of the ground or basis of the decision of the trial court. Another purpose is to make definite just what is decided by the case in order to apply the doctrines of estoppel and res-judicata in future cases. Finally, and possibly most important, the requirement that finding of facts be made is intended to evoke care on the part of the trial judge in ascertaining the facts." Wright - Miller, Federal Practice and Procedure Civ. 2571.

There in a footnote is quoted the following:

> "The Supreme Court has emphasized this function, saying that judges "will give more careful consideration to the problem if they are required to state not only the end result of their industry, but the process by which they reached it." U. S. v. Merz, 1964, 84 S. Ct. 639, 643, 376 U.S. 192, 11 L. Ed. 2d 629.
>
> "For, as every judge knows, to set down in precise words the facts as he finds them

is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus - and - so gives way when it comes to expressing that impression on paper." U. S. v. Forness, C.C.A. 2d, 1942 125 F. 2d 928, 942, (per Frank, J.) certiorari denied 62 S. Ct. 1293 316 U.S. 694, 86 L. Ed. 1764.

"Purpose of this rule relating to findings is to require judge to formulate and articulate findings and conclusions in course of his consideration and determination of case and as part of his decision making process so that he himself may be satisfied that he has dealth fully and properly with all issues in case before he decides it and so that parties involved and reviewing court may be fully informed as to bases of decision when it is made. Roberts v. Ross, C. A. 3d 1965, 344 F. 2d 747.

"The rule is intended both to aid the appellate court on appeal and to aid the trier of facts in his process of adjudication. Woods Construction Company v. Pool Construction Company, C. A. 10th, 1963, 314 F. 2d 405.

4. Consequently, in suit at bar, in the District Court, entire judicial procedure was emphatically frustrated. And that is the main trust of Raitport's appeal that District Court profoundly erred and abrogated Raitport's basic human and Constitutional rights; and whereas should the District Court had complied with Rule 52 FRCP resulted errors in judgment would be simply impossible, as this Court stated in

U. S. v. Forness, supra.

II. COUNSEL FOR CITIBANK VIOLATED RULE 28(e) FRApp. P AND PRINCIPLE OF JURISPRUDENCE.

5. It should be noted that counsels for Citibank violated the Rule 28(e) FRApp. P. They stated that "All of the claims made by Raitport in the present action have been adjudicated..." however failed to cite the page or the records, and of course could not cite it, that the Tort at Law explicitely setforth in paragraphs 7, 8, 9, 12, 16, 17, 18 and 24 of the complaint has been adjudicated by the District Court either in this or previous case.

6. Counsel reciting portions of the complaint in Brief for Appellees omitted portions of complaint at Law based on diversity of Citizenship. Furthermore, the counsels violate the principles of jurisprudence that truth must be said and facts must be presented correctly and completely. Harrelson v. Lewis, 418 F. 2d 246 (C A 4th, 1969), cited by Moore F.P. 222.02(2-11).

III. COUNSELS ARGUMENT INSOFAR AS WHETHER OR NOT A PARTY TO AN ACTION MAY ASSERT JUDGMENT AS A BAR TO A FUTURE ACTION IS OUT OF PLACE BECAUSE IT IS NOT A MATTER OF CONTROVERSY.

IV. RAITPORT URGES THAT DOCTRINE OF NIL DICIT MUST BE APPLIED IN SUIT AT BAR

7. This doctrine, a doctrine of "nil dicit" must be applied; it is qpplied universally:

> "A judgment is rendered on the default of a party, on two grounds; it is considered

> That the failure of the party to proceed is admission that he...if defendant, has no good defense." (Bouvier's Law Dictionary p. 1721).

"Defense" - obviously includes a rational of law.

Black's Law Dictionary states the following:

> "Judgment by "nil dicit" is one rendered for plaintiff when defendant says nothing." This is when he neglects to plead to plaintiff's declaration within the proper time." (p. 1027).

"Nil Dicit" is even a stronger confession than default because "nil dicit" is not a neglect; the attorney is there; he just has nothing to say. What better example could there be of a justification for a judgment in favor of appellant?

8. If a Court deliberates and decides sua sponte whether relief is to be granted and what form that relief should take on a non-contested matter, this would mean that the Court will advocate one side and inevitably, even though subconsciously, become biased towards the non-contestant's advocacy by virtue of the decision on the non-contested matter being its own argument. Will it not frustrate the entire judicial system and the position of the Court therein which is one of being unbiased and impartial; to receive facts and arguments from both sides, weigh them and decide which side should prevail?

9. Is it not the litigants' duty to assist the Court by researching and submitting the applicable law as well as submitting rationales for the respective positions? Does it not our judicial system requires that to be the administrative duty of the litigants and their attorneys? Would the Court

act within its jurisdictional limits should it relieve litigants of this duty? If a litigant, represented by an attorney, does not contest an issue, he has conceded it; he has no defense in fact or of law. If the Court chooses then to provide that defense, it has created a controversy where none before existed. Article III, Section 2 of the United States Constitution extends federal judicial power to "controversies" between parties; Was it not meant that the litigants must come to the Court with a controversy in facts or in law and that the Court will not create a controversy in the absence of such? Is it not elementary that a controversy constitutes equally opposing rationals; that an argument and a silence does not constitute a controversy? Even when the litigants have come to the Court, if a portion of the litigation is not in controversy, may the Court render it so?

10. Every matter before the Court is inherently one of both law and fact by virtue of the fact that courts do not entertain hypothetical questions. A litigant and his attorney are inevitably more familiar with the facts than the Court. Does it not follow that it is not within the province of the Court to tell an attorney that a viable defense exists for his client; in effect telling the attorney that he failed to do sufficient searching?

Consequently, a Court's decision in opposition to an uncontested matter might be an unjustified criticism of its

member.

11. And if there is still an ambiguity whether or not the Constitution has conferred to the courts jurisdiction over none contested issues, in such event should it not be counseled the Bible? Since the Constitution has been written i.. a time that everyone was influenced by, soaked in and impregnated with religion. The minds subconsciously labored along the line, logic and rationals of religion.*
Since ambiguity was not the intent, therefore, unless it is explicit otherwise, the interpretation of the Constitution is meant to be aprallel with that found in the Bible on relevant matters. However, since freedom of religion has been uttered, interpretation meant to be adapted rather from Old Testament which is equally recognized by Christians, Jews and Muslims.

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* Conspicuous proof to this theory exists from eancted statutes by many states and Laws adopted in many courts which manifest absurdity on secular sense. This in some states intentionally to beat up a young girl causing serious bodily injury for sadistic satisfaction is a misdemeanor of second degree, as long as no deadly weapon has been used. 18 PA. S. 1701. However to appease that girl or failure to resist her seduction, then have sexual intercourse with her is a felony of the second degree, 18 PA. S. 3122 (statutory rape). But the Legislators at the time of enacting the statutes were under "hypnotical" domination of Vatican's holding of the Middle Ages that the doctrine of Schechem, Genesis 34, 35 is controlling that violating chastity is worthy of the most severe penalty."

Consequently, plaintiff respectfully submits that it would be justifiable to adopt interpretation from the Old Testament as to what constitutes controversies conferred by the Constitution, Article III, Section 2 to the jurisdiction of the courts.

12. In relevant places the Bible emphasized that the arguments of two litigants must come before the court. In Exodus 22, 9* the original Hebrew uses the phrase "dvar schneihem" which means the words of both (litigants). It is significant that the Bible chooses not to use the possessive form "divrehem" which otherwise would be grammatically more correct and consistent with the overall Biblical style. Within the context of this section of the Bible first impression would lead one to conclude that the entire phrase "dvar schneihem" is superfluous as well as the fact that "schneihem" is used instead of the possessive form. Is the Bible too wordy?

The Courts have settled that even an ordinary legislature does not employ useless verbiage." Skougaard v. The Tungus, 252 F. 2d 14 (C.A.N.J. 1957) affirmed 358 U. S. 588, 3 L. Ed. 2d 524, 71 A.L.R.2d 1280.

Every word used in statute is presumed to have meaning and purpose. Adler v. Northern Hotel Co., 175 F. 2d 619 (C. A. Ill 1949).

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* "For every breach of trust, whether it is for ox, for ass for sheep, for clothing, or for any kind of lost thing, of which one says, "This is it," the case of both parties shall come before God..." (underscoring added)

There is a presumption against construing a statute as containing superfluous or meaningless words or giving it a construction that would render it ineffective." United States v. Blasious, 397 F. 2d 203 (C.A.N.Y. 1968) cert. dismissed 393 J. S. 1008, 89 S. Ct. 615, 21 L. Ed. 2d 557. For those who believe in the holiness of the Bible, the words employed are holy words; the words and their inferences are holy and thus, nonviolated. For those who do not believe in the Bible, this principal of legal construction is a matter of public policy and thus also nonviolate absent strong justification.

> "In a judicial sense, public policy does not mean simply sound policy, or good policy, but it means the policy of a state established for the public wealth either by law, by court or general consent." (citations omitted) Gorpus Juris Secundum, Public Policy, pg. 212.

One third of the world accepts the Bible as guidance for social life in general and particularly, as a basis for jurisprudence. Its doctrine therefore is the public policy by general consent and thus, nonviolate, absence strong rational.

Raitport respectfully submits that the Biblical policy as expressed in Exodus 22, 9 is that the parties should come before the Court; the Court should not act in the absence of the initiation of litigation by the parties nor should it controvert matters within any litigation wnich the parties themselves chose not to contest, or unable to controvert by rationals.

V. COURTS TRADITIONALLY OBSERVE THE RULE OF "NIL DICIT"

13. Rule 28(a) (1) FRApp P) requires that a brief contain a Table of Cases, statutes and other authorities cited. By requiring the inclusion of a table of citations, the litigant is compelled to come forth with a rationale based upon law. Is it not the intention of the Rule to say that absent the legal rationale presented by the litigant, the Court lacks jurisdiction of the matter?

14. In Cakmar v. Hay, 265 F. 2d 59 (9th Cir. 1959), appellant's brief did not conform to the rule of the court as far as the subject index, table of cases and the concise statement of questions involved. The Court there stated: "This appeal appears to us to closely approach the frivolous and vexatious." There the appeal was prepared by an attorney; certainly the Court of Appeals would not publicly insult an attorney; for an oversight perhaps by an inexperienced secretary or even by the attorney himself in failing to include within the brief the required items. The gravamen was that appellant had failed to base his argument on a table of cases; he offered no rationale for his appeal based upon legal authority. As a result, his appeal was termed frivolous. As the Court said: "He has nothing to complain about." This same doctrine must apply with equal force to an appellee.

If a party has no rationale in contesting a claim of error then he should pay the money rather than waste the Court's

time, his own time, as well as that of the opposing litigant's.

15. In the case of Wagner v. Faurett, 307 F. 2d 409 (7th cir. 1962) the defendant failed to raise the defense of the statute of limitations in a right of privacy action. However, the District Court, on its own motion, took judicial notice of the defense under FRCivP 8 (c) and dismissed the complaint. The Seventh Circuit stated:

> "The raising of the defense of the statute of limitations, as opposed to the time limitation in the Wrongful Death Act, is a personal privilege in the manner provided by law, it is waived. It was no concern of the District Court and that Court has no right to apply the statute of limitations sua sponte." (Footnotes omitted) 307 F. 2d at 412.

Similarly, should be said in suit at bar; it is Citibanks' privilege to contra-argue the issues raised by Raitport; upon failure to do so, Citibank admitted to Raitport's argument. Hence, out of necessity this Court must reverse the decision of District Court. In a somewhat analogous case, Roloff et al v. Perdue, 31 F. Supp. 739 (N.D. Iowa 1939) the District Court ruled that it could not take judicial notice of a 12(b) motion to dismiss for failure to state a claim upon which relief could be granted when defendant's motion failed to raise this claim. 31 F. Supp. at 741.

16. These four cases indicate the Court's belief that the adversary process must be maintained and that it is clearly outside the Court's discretion to decide against matters uncontested by argument. See Moore F. P. 228.02 (2-1).

This is not a rule designed to stymie someone upon a technicality but a broad policy to protect the adversary nature of the proceedings and the right of the respective parties to a fair and impartial trial.

VI. CITIBANK ADMITTED ALL TEN POINTS INVOLVED IN THE FOUR ISSUES BEFORE THE COURT.

a) Citibank did not and cannot contest Raitport's contention that district court erred failing to comply with Rule 52 FRCP(a), insofar as two (2) claims at Law are concerned; (page 16*); hence, "nil dicit", it admitted.

b) Citibank did not contest that district court was duty bound to comply with Rule 52 FRCP;(p. 16); by failing to do so it violated Amendment VII and XIV;** (p. 17) hence "nil dicit," it admitted.

c) Citibank did not contest that should district court have complied with Rule 52 FRCP it would not have granted summary judgment (p. 22); hence "nil dicit," it admitted.

d) Citibank did not controvert that district court had specially to find whether the decision invoked as collatoral estoppel was made within jurisdiction of that court; (p. 18); hence "nil dicit" - admitted.

e) Citibank did not contest and cannot contest the contention that the district court failed to adjudicate whether

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* Pages refer to Brief for Appellant unless otherwise specified.

** Due to an error in Appellant Brief appeared Amendment "V"; it should read "XIV".

the decision invoked as collatoral estoppel was made within jurisdiction of that court, (p. 17); hence "nil dicit" - admitted.

f) Citibank did not controvert the contention that since it was a conflict of facts whether the decision invoked as res judicata was not within jurisdiction of that court, therefore invalid; summary judgment is impermissible, (p. 18) hence, "nil dicit" - admitted.

g) Citibank did not contest Raitport's contention that it would be improper and impractical to consolidate the case at bar with the previous case (p. 19); hence "nil dicit" - admitted.

h) Citibank did not contest the contention that since it was improper to consolidate the cases collatoral estoppel may not be invoked; (p. 21, 22); hence "nil dicit" - admitted.

i) Citibank did not contest that pursuant to Rule 52 FRCP district court was duty bound specially to find that Raitport's failure to joint the case at bar in previous action was a delatory action (p. 20); hence "nil dicit" - admitted.

k) Citibank did not contest the contention that since failure to consolidate was not a delatory action the collatoral estoppel was improperly invoked, (p. 21); hence "nil dicit" - admitted.

VII. APPELLEES' - CITIBANK'S ADMISSIONS ARE MORE THAN SUFFICIENT TO REVERSE AND GRANT SUMMARY JUDGMENT IN RAITPORT'S FAVOR

17. "An uncontroverted statement in the appellant's brief will be taken as true by the appellate court.

It is a principle of general application under rules of court regulating briefs that statements in appellant's brief, which the rules provide that it shall contain, will be taken as true where appellee does not appear, or where such statements are not controverted in appellee's brief, or where no brief is presented by appellee. It has been so held with respect to statements, made in appellant's brief, of the evidence of statements of the case, of statement of the record, of assigned errors or of such parts of the record as are claimed to present the error or errors relied on for reversal.

Where appellant's brief apparently contains all the material evidence, and is accompanied by a statement that it does contain such evidence, respondent cannot, by a bare denial that the brief contains such evidence, preclude the appellate court from considering the sufficiency of the evidence, but should insert in his brief such additional statement as is necessary."* (citations omitted) 5 - CJS - Appeal and Error - 1344 (underscoring added)

l) Citibank did not contest that Raitport is a very worthy contributor to the society at large, (p. 3, 5, 7, 8) hence "nil dicit" - admitted.

m) Citibank did not contest that it destroyed Raitport's projects; hence "nil dicit" - admitted.

n) Citibank did not contest that it caused inflation, recession and rise of crimes for the purpose to monopolize banking

* Raitport respectfully submits that it appears the author intended to say that in order to invoke jurisdiction of the court there must be a controversy. The controversy is generated by the appellees either denial of facts, or controverting a rational. It is insufficient to deny a rational because the basic principle of justice-test of sincerity-cannot be satisfied by denial of a rational. While a fact may be simply denied, a rational must be controverted by an opposing rational. Whereas absent of controversy the appellate court will accept as true statements of appellant and consequently proceed as of course to grant the request of appellant.

industry, (p. 8, 9, 10) hence "nil dicit."
In the complaint as well Raitport asserted that; should they have what to say, would the counsels leave such accusation uncontested, if for the record only? But, besides that it is a rule of courts - uncontroverted statements are taken as true. 5 CJS - 1344.

18. Consequently, justice to the people requires to reverse the judgment of district court and Grant Summary Judgment in favor of Raitport as to liabilities, and remand for determination of damages, that wounds of the people may be cured as soon as possible.

CONCLUSION

19. Consequently, Raitport respectfully submits that jurisdiction of this Court in case at bar has been partially erroded and destroyed and limited to vacate district court's order and either to sanction appellees and reverse the judgment of the district court, that is to Grant Summary Judgment against appellees as to liabilities; or to remand the case for proceeding do novo. But, this Court is without jurisdiction to affirm the judgment of the district court in view of two independent grounds:

a) District court's failure to comply with Rule 52 FRCP(a) deprived an appellate court of its Constitutional jurisdiction conferred by Article III, Section 2, because it lacks the material needed for review; hence judicial process intended by the Constitution has been destroyed.

b) Citibank's admissions lifted the controversial

effect mandatory at Law and Constitution to permit Court's deliberation.

RESPECTFULLY SUBMITTED,

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DATED: October 10, 1975